Dusun Desaru Sdn Bhd & Anor v Wang Ah Yu & Ors

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-1197 OF 1998
ABDUL MALIK ISHAK J
15 MARCH 1999

***Evidence** — Privilege — 'Without prejudice' negotiaions — Admissibility of 'without prejudice' negotiations — Waiver — Whether there was waiver by conduct on the part of the plaintiffs when plaintiffs first introduced 'without prejudice' letter — Whether 'without prejudice' letters subsequently produced by defendant were admissible*

The plaintiffs, through encl 5, applied to remove a private caveat lodged by the sixth defendant on two pieces of land belonging to the first plaintiff. In their affidavits in support of the application, namely encls 3 and 4, the plaintiffs introduced a 'without prejudice' letter, and in reply, the sixth defendant, by way of encls 7 and 11, introduced several 'without prejudice' letters. In his preliminary objection, counsel for the plaintiffs objected to the introduction of the 'without prejudice' letters by the sixth defendant. Counsel for the sixth defendant submitted that there was a waiver on the plaintiffs' part to object to the introduction of the 'without prejudice' lettters, when the plaintiffs themselves had introduced, from the very beginning, the 'without prejudice' letter.

Held, dismissing the preliminary objection:

(1) The veil of privilege may be waived, but both parties must consent to the waiver. As with the forms of other privilege, a waiver may be implied by conduct. There was thus a waiver on the part of the plaintiffs of the privilege shield when they first introduced the 'without prejudice' letter in encl 4 (see p 457C–D).

(2) All letters labelled 'without prejudice' in encls 3, 4, 7 and 11 have been waived and only these documents will be considered and weighed by the court in determining encl 5 and no more. There would certainly be 'no ripple of discovery' that would be unfair to the plaintiffs. It is a correct assertion to say that central to the issue of waiver would be the principle of fairness. No judge can restore a privilege that has been waived even though such waiver was mistakenly made (see p 458F–G).

[Bahasa Malaysia summary

Plaintif-plaintif, melalui lampiran 5, membuat permohonan untuk mengeluarkan satu kaveat persendirian yang dimasukkan oleh defendan keenam ke atas dua bidang tanah yang dipunyai oleh plaintif pertama. Di dalam afidavit-afidavit sokongan kepada permohonan mereka, iaitu lampiran 3 dan 4, plaintif-plaintif telah mengemukakan satu surat 'tanpa prejudis', dan dalam afidavit jawapannya, defendan keenam telah mengemukakan, melalui lampiran 7 dan 11, beberapa surat 'tanpa prejudis'. Di dalam bantahan permulaannya, peguam

plaintif-plaintif telah membantah terhadap pengemukaan surat-surat 'tanpa prejudis' oleh defendan keenam. Peguam defendan keenam telah menegaskan bahawa telah terdapat satu penepian pada pihak plaintif-plaintif, untuk membantah terhadap pengemukaan surat-surat 'tanpa prejudis tersebut, apabila plaintif-plaintif sendiri telah mengemukakan, daripada mula lagi, surat 'tanpa prejudis' itu.

Diputuskan, menolak bantahan permulaan:

(1) Tirai perlindungan boleh diketepikan, tetapi kedua belah pihak hendaklah memberi persetujuan kepada penepian tersebut. Seperti bentuk-bentuk perlindungan yang lain, satu penepian boleh disiratkan melalui perbuatan. Terdapat satu penepian perlindungan tersebut oleh plaintif-plaintif apabila mereka terlebih dahulu telah mengemukakan surat 'tanpa prejudis' itu di dalam lampiran 4 (lihat ms 457C–D).

(2) Kesemua surat-surat yang dilabelkan 'tanpa prejudis' di dalam lampiran 3, 4, 7 dan 11 telah diketepikan dan hanya dokumen-dokumen ini sahaja yang akan dipertimbangkan oleh mahkamah di dalam memutuskan lampiran 5. Tidak akan terdapat penemuan yang mungkin tidak adil kepada plaintif-plaintif. Adalah satu kenyataan yang tepat untuk mengatakan bahawa perkara utama kepada isu penepian adalah prinsip keadilan. Tiada hakim yang boleh mengembalikan satu perlindungan yang telah diketepikan walaupun penepian tersebut telah dilakukan secara tersilap (lihat ms 458F–G).]

Notes

For a case on admissibility of 'without prejudice' documents, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1376.

Cases referred to

AF v Mulholland; Attorney-General v Foster [1963] 2 WB 477 (refd)
Anderson v Bank of British Columbia (1876) 2 Ch D 644 (refd)
Attorney-General (NT) v Maurice (1986) 69 ALR 31 (refd)
Baker v Campbell (1983) 57 ALJR 749 (refd)
Bentley v Nelson [1963] WAR 89 (refd)
Briamore Manufacturing (In liquidation), Re [1986] 3 All ER 132 (refd)
Burnell v British Transport Commission [1956] 1 QB 187 (refd)
Daintrey, Re; ex p Holt [1893] 2 QB 116 (refd)
Davies v Nyland (1975) 10 SASR 76 (refd)
Daya Anika Sdn Bhd v Kuan Ah Hock [1998] 6 MLJ 537 (refd)
Field v Commissioner for Railways 99 CLR 285 (refd)
Freer v Freer [1956] SASR 163 (refd)
General Accident Fire and Life Assurance Corp Ltd & Ors v Tanter & Ors; The Zephyr [1984] 1 All ER 35 (refd)
Great Atlantic Insurance Co v Home Insurance Co & Ors [1981] 1 WLR 529; [1981] 2 All ER 485 (refd)

Griffiths v Evans [1953] 2 All ER 1365 (refd)
Harris, Re (1875) 32 LT 417 (refd)
Healey v Thatcher (1838) 8 C & P 388 (refd)
Indian Rubber, Gutta Percha and Telegraph Works Co Ltd v Chapman (1926) 20 BWCC 184 (refd)
Knapp v Metropolitan Permanent Building Society Association (1888) 9 NSWLR 468; 5 NSWWN 27 (refd)
Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17 (refd)
Matthews v Munster (1888) 20 QBD 141 (refd)
McCallum v Country Residences Ltd [1965] 1 WLR 657 (refd)
Minter (Pauper) v Priest [1930] AC 558 (refd)
Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No 2) [1981] Com LR 138 (refd)
Nicholson v Southern Star Fire Insurance Co Ltd (1927) 28 SRNSW 124 (refd)
Oh Kuang Liang v Associated Wood Industries Sdn Bhd [1995] 4 MLJ 390 (refd)
Oliver v Nautilus Steam Shipping Co Ltd [1903] 2 KB 639 (refd)
Paddock v Forrester (1842) 3 Man & G 903 (refd)
Peacock v Harper (1877) 26 WR 109 (refd)
Proctor v Smiles (1886) 55 LJ WB 467 (refd)
Rabin v Mendoza & Co [1954] 1 WLR 271 (refd)
Rush & Tompkins Ltd v Greater London Council & Anor [1989] AC 1280 (refd)
South Shropshire District Council v Amos [1987] 1 All ER 340 (refd)
Southern Cross Commodities Pty Ltd (In liquidation) v Crinis [1984] VR 697 (refd)
Theodoropoulas v Theodoropoulas [1963] P 311 (refd)
Tomlin v Standard Telephones and Cables Ltd [1969] 3 All ER 301 (refd)
Trade Practices Commission v Arnotts Ltd (1989) 88 ALR 69 (refd)
Turf Enterprises Pty Ltd, Re [1975] Qd R 266 (refd)
Walker v Wilsher (1889) 23 QBD 335 (refd)
Wong Nget Thau & Anor v Tay Choo Foo [1994] 3 MLJ 723 (refd)

Mohd Fairuz bin Abdullah (*Sabaruddin Ali & Co*) for the plaintiffs.
Ng Chew Hor (*WJ Chen & Co*) for the sixth defendant.

Abdul Malik Ishak J: Mr Mohd Fairuz bin Abdullah, learned counsel for the plaintiffs, was magnanimous enough to withdraw the originating summons against the first to the fifth defendants on 26 November 1998, and an order to that effect was made with costs, to be assessed. The application for leave to cease the originating summons against the first to the fifth defendants can be seen in encl 14 which was supported by an affidavit of Lim Yuk Lan, a director of the plaintiffs, and an individual authorized to affirm the affidavit in support as seen in encl 13 which was affirmed on 7 November 1998. In encl 13 at para 5, there was an intimation that the plaintiffs, through their solicitors by a letter dated 1 October 1998, labelled as 'without prejudice', addressed to the solicitors of the first to fifth defendants, had proposed a settlement to these proceedings. But the plaintiffs were still keen to proceed against the sixth defendant, one Wang

Boon Kang, and for that reason, the hearing of encl 5 was adjourned to 22 December 1998. As Mr Ng Chew Hor, counsel for the sixth defendant, had to proceed to the Singapore National Eye Centre for treatment on 22 December 1998, the hearing of encl 5 was mutually agreed to be heard on 25 February 1999. A

Briefly, encl 5 was an application by the plaintiffs to remove a private caveat lodged by the sixth defendant on 5 September 1997, on two pieces of lands belonging to the first plaintiff comprised in HS (M) 790 PTD 17690 Mukim Plentong, District of Johor Bahru and GM 597 Lot 17661 Mukim Plentong, District of Johor Bahru. Enclosure 5 was supported by two affidavits. The first affidavit was deposed by Lim Nyuk Lan on 21 July 1998, as seen in encl 3, while the second was deposed by Chiang Kim Ming on 21 July 1998, as reflected in encl 4. Enclosure 7 was an affidavit deposed on 1 September 1998, by the sixth defendant and this served as a reply to encls 3 and 4. The sixth defendant further deposed another affidavit in encl 11 on 16 September 1998, as an additional affidavit to encl 7. It must be borne in mind that there was no reply to encl 7. B C D

The hearing of encl 5, on 25 February 1999, turned out to be an interesting affair. Mr Mohd Fairuz bin Abdullah took exception to the introduction of letters labelled with 'without prejudice' tags in encls 7 and 11, and this formed the brunt of his preliminary objection. Mr Ng Chew Hor, learned counsel for the sixth defendant, pointed out that it was the plaintiffs who first introduced the 'without prejudice' letters in encl 4, particularly, exhs A14, A15, A16 and A17 and by doing so, the plaintiffs have opened the pandora box for everyone to see. I have perused through exhs A14, A15, A16 and A17 of encl 4 and I found that only exh A14 bore the 'without prejudice' label while exhs A15, A1 and A17 were open letters which in no way showed that the shield of privilege had been broken, as these letters were all related to the proposed settlement that was contemplated between the parties. Not a single letter bearing the 'without prejudice' label was exhibited in encl 3. Mr Ng Chew Hor also argued that the introduction of 'without prejudice' letter by the plaintiffs meant that the latter had introduced privileged evidence and this left the sixth defendant with no option but to either object or introduce, on his own volition, the version of the factual matrix through the 'without prejudice' letters in encls 7 and 11. In short, Mr Ng Chew Hor submitted that there was a waiver on the plaintiffs' part to object to the introduction of the 'without prejudice' letters in encls 7 and 11 when the plaintiffs themselves introduced, from the very beginning, the 'without prejudice' letter in encl 4. A perusal of the 'without prejudice' letters in encl 7 (exh 'D' comprising of three letters and exh 'F' comprising of one letter) showed the willingness to accept a lesser amount by way of a settlement. If at all, these 'without prejudice' letters in encl 7 certainly gave the impression of a settlement. Thus, it would be critical to determine whether or not there was indeed a settlement by looking at all the 'without prejudice' letters annexed to and exhibited in encls 4, 7 and 11. The English Court of Appeal in *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, had to consider the admissibility of the letters headed 'without prejudice' to determine whether there was a binding agreement. Danckwerts LJ, delivering the judgment of the English Court of Appeal had this to say at pp 203–204 of the report: E F G H I

A point that arises is that all the letters written by the agent of the insurance company bore the words 'without prejudice'. The point is taken that, by reason of those words, there could not be any binding agreement between the parties and it was said, indeed, on behalf of the defendants that the letters were not admissible. I feel no doubt, as the learned judge felt no doubt, that the letters were admissible, because the point was whether there had been a concluded agreement of any kind between the parties in accordance with that correspondence, and it would be impossible to decide whether there was a concluded agreement or not unless one looked at the correspondence. The learned judge quoted a statement by Lindley LJ, which really was in the case no more than a dictum, but seems to me have great force and to be of great importance in regard to the case. That was in *Walker v Wilsher* (1889) 23 QBD 335. When the case is looked at, it appears that in fact the decision was that the letters in question should not have been looked at for the purpose of the case at all and that, consequently, the judge in the court below was at fault in relying on them for the purpose of depriving the party of his costs. But in the course of his judgment, Lindley LJ said (at p 337):

> 'What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.'

That statement of Lindley LJ is of great authority and seems to me to apply exactly to the present case if in fact there was a binding agreement, or an agreement intended to be binding, reached between the parties; and, accordingly, it seems to me that not only was the court entitled to look at the letters although they were nearly all described as 'without prejudice', but it is quite possible (and in fact the intention of the parties was) that there was a binding agreement contained in that correspondence. That disposes of the first point.

Chang Min Tat FJ (as he then was), delivering the judgment of the Federal Court in *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17, lucidly laid down the law in these words (see p 18 of the report):

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

Incidentally, the learned judges in *Wong Nget Thau & Anor v Tay Choo Foo* [1994] 3 MLJ 723 and in *Daya Anika Sdn Bhd v Kuan Ah Hock* [1998] 6 MLJ 537, also considered the case of *Malayan Banking Bhd v Foo See Moi*. On the same subject matter, I did say a few words in *Oh Kuang Liang v Associated Wood Industries Sdn Bhd* [1995] 4 MLJ 390, particularly at pp 394–395 of the report:

> I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing from being given in evidence. A prudent and competent solicitor will

always be on guard and will always label any negotiating correspondence with the words 'without prejudice' — to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to the litigation, on the other.

I have done some research and I have discovered that nearly all the cases where the scope of the 'without prejudice rule' has been considered, concern the admissibility of evidence at trial after negotiations have failed. It is quite obvious that in these situations no question of discovery arises because the parties are well aware of what had transpired between them in the negotiations. It is not incorrect to say that the underlying purpose of the 'without prejudice rule' is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Lindley LJ, held in *Walker v Wilsher* (1889) 23 QBD 335 at p 337, that the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement and this point seems to have been applied in *Tomlin*. I must at once sound a warning that *Walker v Wilsher* is not an authority for the proposition that if the negotiations succeed and a settlement is concluded, the privilege is thrown to the wind, having served its purpose. On a proper reading of *Walker v Wilsher*, I would have thought that there it was held that it was not permissible to receive the contents of a without prejudice offer on the question of costs and no question arose as to the admissibility of admissions made in the negotiations in any possible subsequent proceedings. *Cutts v Head* [1984] 1 All ER 597, propounds the principle that in certain circumstances, the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given. In *Re Daintrey, ex p Holt* [1893] 2 QB 116; [1891–94] All ER Rep 209, the court refused to allow the 'without prejudice rule' to exclude an act of bankruptcy and in *Kitcat v Sharp* (1882) 48 LT 64, the court too refused to be bound by the 'without prejudice rule' when its purpose was to suppress a threat if an offer is not accepted. I am of the view that the exceptions referred to in these cases should not and must not be allowed to whittle down the protection given to all parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the maker should not be held accountable and the admission of the facts made for the purpose of the compromise should not be received in evidence. I am not prepared, to borrow the words of Ormrod J in *Tomlin*, to lift the umbrella of 'without prejudice' for the applicant. Rain or shine, that umbrella should remain.

For the record, the case of *Oh Kuang Liang v Associated Wood Industries Sdn Bhd* was also reported in two other popular local law journals, vide [1995] 2 CLJ 961 and [1995] 2 AMR 1872.

The case of *Field v Commissioner for Railways* 99 CLR 285 at p 291, lays down the following proposition: As a matter of policy, the law has long excluded from evidence, admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation, to communicate with one another freely and without the embarrassment which the liability of their communications, to be put in evidence subsequently, might impose upon them. To me, without prejudice communications can be said to be

privileged or for a better nomenclature privileged communications. Two common features must be present before this privileged communications could be activated:

(a) some individuals must be in dispute and that dispute led them to negotiate with one another; and

(b) the communication between the parties must contain suggested terms that would finally lead to the settlement of the dispute.

These requirements have been lucidly laid out in two old vintage cases. The first would be the English case of *Re Daintrey; ex p Holt* [1893] 2 QB 116 at pp 119–120. The second case emanates from Australia, and it is the case of *Bentley v Nelson* [1963] WAR 89 at p 93. It would be a correct statement of the law to say that if the letter shows an absolute rejection of the claim by the plaintiffs, then there is no intention at all to negotiate and, consequently, the privilege will not arise (*Nicholson v Southern Star Fire Insurance Co Ltd* (1927) 28 SRNSW 124). Surprisingly though, an apology would be accepted and be protected under the umbrella of the without prejudice communication (*Healey v Thatcher* (1838) 8 C & P 388). Another significant factor to note would be that the communication need not have to contain the classical offer in the context of a contract. Suffice that that communication forms part and parcel of the negotiation towards settlement (*South Shropshire District Council v Amos* [1987] 1 All ER 340).

Negotiations to settle disputes may be conducted in many ways: by oral means (face to face), by correspondences, by facsimile communications, by exchanges of telex messages, by courier services or the combination of any one of them. In *Rush & Tompkins Ltd v Greater London Council & Anor* [1989] AC 1280, the House of Lords ruled that genuine negotiations with the sole object of settlement are protected from disclosure whether or not the 'without prejudice' label has been expressly employed in the negotiations. As I said, exhs A15, A16 and A17 of encl 4 do not carry the 'without prejudice' labels, yet the shield of privilege would apply to them. Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council*, aptly put it as follows (see pp 1299–1300 of the report):

> The 'without prejudice' rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful, they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice', and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission.

The impression that one gets from a letter bearing the 'without prejudice' mark would show that the parties are genuinely seeking to compromise their dispute and giving it a stamp of confidentiality which would not be referred to at the trial in the event of the negotiations fell through. A compromise is nothing more than to put an end to the dispute in which the parties had

hitherto been engaged. It gives finality to the dispute (*McCallum v Country Residences Ltd* [1965] 1 WLR 657 at p 660, per Lord Denning MR). But this does not mean that the failure to use the magical words 'without prejudice' would mean that the party making the offer to settle intends the offer to be an open one. It would be prudent for any party who wishes an offer of settlement to be regarded as an open offer, expressly puts his intention on paper by expressly stipulating it to be so. Thus an express stipulation would mean that an offer is made 'without prejudice' and this is the best method to adopt. To play safe, a telephone conversation in which negotiations are conducted should be prefaced with words to the effect that the negotiations are 'without prejudice': an express stipulation of this sort will always be upheld by the court (*Rush & Tompkins Ltd v Greater London Council* at p 65 and *Walker v Wilsher*). Even a subsequent letter may, ex post facto, declare an earlier one to have been made 'without prejudice' (*Peacock v Harper* (1887) 6 WN 109). On the other end of the scale, there will be a situation where the first of a series of letters is marked 'without prejudice' and the rest of the series will be regarded by implication to be of the same character (*Paddock v Forrester* (1842) 3 Man & G 903 and *Re Harris* (1875) 32 LT 417). This would be the natural inference to draw unless there is a clear break in the chain of correspondence to show that the privilege is not claimed (*India Rubber, Gutta Percha and Telegraph Works Co Ltd v Chapman* (1926) 20 BWCC 184), and I will emphasize this basic principle at a later stage of this judgment. So, legal practitioners must take heed and be prudent, for the law knows no one. On going negotiations with 'without prejudice' tags, and where the parties agreed to obtain further information from a third party, the court will definitely hold that that further information, documented or otherwise, are impliedly 'without prejudice' and ought not to be referred to (*Rabin v Mendoza & Co* [1954] 1 WLR 271, per Lord Denning LJ at p 273 of the report).

Once a letter is labelled 'without prejudice', it automatically gives rise to an understanding that all previous (*Oliver v Nautilus Steam Shipping Co Ltd* [1903] 2 KB 639) and, I may add, subsequent (*Davies v Nyland* (1975) 10 SASR 76 at p 105) negotiations between the parties will be similarly protected from disclosure. This seems to be the stand adopted by Mr Mohd Fairuz bin Abdullah, counsel for the plaintiffs. As I said in *Oh Kuang Liang v Associated Wood Industries Sdn Bhd*, when negotiations fell through, all letters bearing the words 'without prejudice' should not be referred to at the trial proper. In *Paddock v Forrester* at p 919, the situation is quite peculiar. There, the answer to a letter marked 'without prejudice' was held to be not admissible even though the answer itself had not been headed 'without prejudice'. In my reading of the materials available in the library and my understanding of the same, it seems to me, and I had said this earlier, that when the first letter of correspondence is entitled 'without prejudice', then everyone must be on guard as it affects the whole correspondence thereafter, unless there is a clear break in the chain of evidence to show that the ensuing letters are open (*Re Turf Enterprises Pty Ltd* [1975] Qd R 266 at p 268). The crucial question to pose would be this:

When would the document lose its privilege status?

A The answer, if I may venture to advance one, is this: once the settlement is negotiated successfully and the matters finalized completely, then the document will lose its sting as a privilege document because its purpose is now complete and at an end (*Knapp v Metropolitan Permanent Building Society Association* (1888) 9 NSWLR 468; 5 NSWWN 27 and *South Shropshire District Council v Amos* [1987] 1 All ER 340). Mr Mohd Fairuz B bin Abdullah took exception to the production of the letters marked 'without prejudice' in encls 7 and 11, as it was his stand that the settlement fell through and these letters should therefore not be exhibited nor referred to at all in both these enclosures. Mr Ng Chew Hor valiantly argued that there was a waiver on the part of the plaintiffs to the privilege attached to C the letters marked 'without prejudice' in encls 7 and 11, because the plaintiffs were the ones that first introduced the 'without prejudice' letter in encl 4. It was a classic case of the pot calling the kettle black. Now, from my understanding of the law, the veil of privilege may be waived, but both parties must consent to the waiver (*Theodoropoulas v Theodoropoulas* [1963] P 311). But a caveat must be lodged. There is always an exception to the D general rule. As with the other forms of privilege, waiver may be implied by conduct (*Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 69). There was thus a waiver on the part of the plaintiffs of the privilege shield when they first introduced the 'without prejudice' letter in encl 4. This was my judgment and I so hold accordingly. To hold otherwise would be perverse and against the great mass of authorities.

E It must be emphasized that the shield of privilege is that of the client and not that of the lawyer. This has been held by the English and Australian judges since time immemorial. Two English cases may be cited: *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at p 646 and *AG v Mulholland; AG v Foster* [1963] 2 QB 477 at p 489. One Australian case would suffice: F *Freer v Freer* [1956] SASR 163 at p 169. In short, it is only the client that can waive that shield of privilege (*Proctor v Smiles* (1886) 55 LJ QB 467 at p 528; *Minter (Pauper) v Priest* [1930] AC 558 at p 579; *Baker v Campbell* (1983) 57 ALJR 749, and *Southern Cross Commodities Pty Ltd (In liquidation) v Crinis* [1984] VR 697 at p 698). These are general rules, and they may take a different complexion depending on the role of the lawyer in question. G Thus, a lawyer representing his client in an action is said to be '... the agent of his client in all matters that may reasonably be expected to arise for decision in the cause' (*Matthews v Munster* (1888) 20 QBD 141 and *Griffiths v Evans* [1953] 2 All ER 1365 at p 1371). Thus, as a lawyer for his client in an action, that lawyer can waive the shield of privilege (*Great Atlantic Insurance Co v Home Insurance Co & Ors* [1981] 1 WLR 529; [1981] 2 All H ER 485). I need to examine briefly the case of *Great Atlantic Insurance*. There, it transpired that at the trial, the counsel read a particular document, not realizing that that document was incomplete. The remainder of that document was privileged. The court construed it adversely against the counsel and held that as it had been deliberately introduced into the court I record, and as the document dealt with only one subject matter and was thus, indivisible into distinct segment, the party concerned must therefore disclose the whole document to the court. Even waiver through cross-examination was vigorously applied in *Burnell v British Transport Commission* [1956] 1 QB 187. Here, waiver of Mr Mohd Fairuz bin Abdullah was by

conduct when the 'without prejudice' letter was exhibited and annexed to encl 4. The decision and the rationale behind the case of *Great Atlantic Insurance Co*, may lie in the need of the court to satisfy itself by perusing through the document and thereby releasing the shield of privilege. The justice of the case demands just that, for otherwise, the actual weight and meaning to be attached to the document would be lost and be misunderstood (*Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No 2)* [1981] Com LR 138, as applied vigorously in *General Accident Fire and Life Assurance Corp Ltd & Ors v Tanter & Ors, The Zephyr* [1984] 1 All ER 35 at p 43; *Attorney-General (NT) v Maurice* (1986) 69 ALR 31). Justice too requires this court to examine in depth all the letters whether open or 'without prejudice' in encls 3, 4, 7 and 11. Mr Mohd Fairuz bin Abdullah must be held accountable for waiving the shield of privilege and, with respect, he too may be estopped from denying the waiver.

The present case may also be considered to be an implied waiver. The potent question to ask is this: Would it be unfair to maintain the privilege? This was also the question that the court in *Attorney-General (NT) v Maurice*, asked itself. An implied waiver of the privilege would mean that the court would apply the principle of fairness to determine the extent of the enquiry as a result of that waiver (*General Accident Fire and Life Assurance Corp Ltd & Ors v Tanter & Ors, The Zephyr*) and the extent of the enquiry must be confined to the documents waived and no further. Other documents not waived would not be examined by the court as it would not be fair to the waiving party for the waiver to extend to other documents, thereby causing an overwhelming ripple of discovery (*Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No 2)*). In my judgment, all the letters open and labelled 'without prejudiced' in encls 3, 4, 7 and 11 have been waived and only these documents will be considered and weighed by the court in determining encl 5 and no more. There would certainly be 'no ripple of discovery' that would be unfair to the plaintiffs. It is a correct assertion to say that central to the issue of waiver would be the principle of fairness. No judge in the world can restore a privilege that has been waived even though such waiver was mistakenly made. It is my judgment that it is difficult for the judges to pretend that the privilege information which has been revealed has not been exposed (*Re Briamore Manufacturing (In liquidation)* [1986] 3 All ER 132 and *Great Atlantic Insurance Co v Home Insurance Co & Ors* [1981] 1 WLR 529 at pp 540–541). I hold the view that in the interest of a fair trial, litigation should be conducted on the footing that all relevant documentary evidence is made available to the court. The present case is not an exception.

For these reasons, I dismissed the preliminary objection advanced by Mr Mohd Fairuz bin Abdullah with costs.

Preliminary objection dismissed.

Reported by Tan Cheng Siong